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IN THE

Supreme Court of the United States

October Term, 1954

No. 744

THOMAS J. VAN DYKE, *Petitioner*

Vs.

BLUEFIELD GAS COMPANY, *Respondent*
a Corporation,

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

LeROY KATZ,
Ritz Building
Bluefield, West Virginia
Attorney for Respondent

June 1, 1954

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To the Honorable, Chief Justice and the Associate Justices of the Supreme Court of the United States.

Your respondent, Bluefield Gas Company, a corporation, prays that the petition of Thomas J. Van Dyke, petitioner, for a writ of certiorari to review the judgment entered in this case on February 16, 1954, by the United States Court of Appeals for the Fourth Circuit be denied.

OPINION BELOW

The District Court did not file a written opinion but the findings of the court are found in transcript of the Record filed with this court by the petitioner as appendix to appellant's brief (R. 1-7). The opinion of the Circuit Court of Appeals (R. 95-99) is reported at 210 Fed. 2nd, 620.

JURISDICTION

The judgment of tthe Court of Appeals was entered February 16th, 1954 (R. 99-100). The jurisdiction of this Court is invoked under Section 1254 (1) of the Judicial Code, (Act June 25th, 1948, c. 646, Sec. 1; 62 Stat. 928; 28 U. S. C. A. 1254 (1)).

QUESTIONS PRESENTED

1. Whether an employee of a gas company who is employed at their service plant to answer emergency calls from customers and relay the calls to the service man during the night is entitled to compensation for sleeping time where interruptions of sleep were so few as to be almost non-existent.

2. Whether the sleeping facilities provided the petitioner can be declared inadequate after finding of fact by the trial court that said facilities were adequate, which finding was sustained by the Circuit Court of Appeals.

3. Whether the trial court has abused its discretion in disallowing liquidated damages where said court has made a finding that failure to pay said wages and overtime was in good faith and upon reasonable grounds for believing the omission was not a violation of the Act.

STATUTES AND REGULATIONS INVOLVED

The applicable statutes and regulations are presented in the appendix infra pages 13 - 14.

STATEMENT

The pertinent facts may be summarized as follows:

This action was instituted by Thomas J. Van Dyke, an employee of the Bluefield Gas Company, a corporation, to recover wages and over time which the petitioner claims was due him under the provisions of the *Fair Labor Standards Act of* 1938 *as amended* (29 *U. S. C. A.* 201 *et seq.*). Petitioner was employed from August 11, 1951, until April 14, 1953. The Bluefield Gas Company, the employer, is a locally owned

natural gas company providing natural gas service to the residents of Bluefield, West Virginia; a subsidiary of the Bluefield Gas Company, the Commonwealth Public Service Company, operates in the State of Virginia, but is a separate and distinct corporation. This corporation serves the residents of the town of Bluefield, Virginia.

All equipment used by said Gas Company is automatic and stations are provided in seven places throughout the city for the purpose of controlling the gas distribution in different parts of said city. One of these stations is located on the north side of Bluefield where the petitioner employee worked. The gas distribution equipment, however, at that particular place is identical with the gas equipment in other parts of Bluefield where no employees are located, as all equipment is automatic. At the northside service plant during the day time other employees of said company work on gas meters and other equipment used by the company. After 5 o'clock no work was performed at said plant.

The Company employed the petitioner to answer trouble calls from the customers. In August, 1951 the petitioner came to the defendant's business office located in the City of Bluefield and requested a job of the defendant corporation (R. 79). The respondent manager advised the petitioner that a man was needed to answer the telephone on trouble calls after 5 o'clock P. M. (R. 79). The petitioner advised tthe respondent's manager that he was a used car dealer and also performed work around his home and apartment buildings which he owned. This would necessitate his being free to work during the day time and he therefore requested the job of answering the telephone for emergency calls from 5 o'clock P. M. until 7 o'clock A. M. (R. 79). His only duties were to answer the telephone and if he heard any disturbances to call tthe police, but petitioner was to take no action himself and did not perform any other service. Upon receiving a trouble call from a customer the petitioner then called the service man and relayed the message to him. No further action was required. A salary of $150.00 per month was agreed upon. (R.85). *The petitioner had no supervisory, guard or other duties to perform. The petitioner was free to sleep at any time after* 10 *o'clock* (R. 80) and the respondent company furnished a bed, and a telephone was placed

at the bed so that in the event a phone call came through, the petitioner would not have to get out of bed to answer the phone. (R. 81). This phone was placed at his bed even though another phone was located in the same building in the next room. The evidence discloses that during the period of employment of 20 *months* during which time reports were made by the petitioner *only* 18 *telephone calls* were received by the petitioner between the hours of 10 o'clock in the evening and 7 o'clock the following morning. (R. 70).

The District Court found on the question of fact that the facilities furnished the petitioner by the respondent were adequate; that he was provided with a bed, toilet facilities, wash basin, and a radio was also located in the building. Heat was furnished by means of natural gas heaters, including heat in the bedroom and the *Circuit Court of Appeals sustained the finding of the District Court as to the adequate facilities furnished.*

Petitioner claimed that he was only able to get brief naps. However, respondent showed by evidence of a disinterested witness who lived in the same house as the petitioner, that he did not sleep at his home but in fact sold used cars during the day time and worked around his house and the apartment house owned by him. (R. 87). *The District Court made a finding of fact that petitioner did sleep on the respondent's premises, which finding was affirmed by the Court of Appeals.* By agreement with the petitioner he furnished his own bed clothes as the respondent company had no laundry facilities. Petitioner in interrogatories asserted that he had regular night watchman duties to perform, but abandoned such contentions upon a trial of the case and admitted that he performed no night watchman's duties, (.R 71) and in fact locked the door to said building and same remained locked throughout the night in the same manner as if he were in his own home. (R. 74-75)

The District Court found that the petitioner could and did have the opportunity to sleep uninterrupted for six hours each night and therefore deducted from his compensable hours six hours of sleeping time for which the petitioner was not to be paid. The court found the remaining hours on the job were compensable. An important feature in determining that the

petitioner had uninterrupted sleeping time was the fact that during the entire period of employment during which time reports were made to the defendant, only 18 telephone calls were received by the petitioner between the hours of 10 o'clock in the evening and 7 o'clock the following morning (R. 70). This number of phone calls can hardly be considered more unusual than an individual would receive in his own home during such a period of time.

The District Court likewise refused liquidated damages to this petitioner based upon the testimony of an officer of the company who was a stockholder and *also an attorney at law* that he had read the Wage and Hour Act and decisions pertinent thereto and had consulted with a labor relations expert in the area before arriving at the conclusion that a person in the position held by this particular employee was not covered by the Act. (R. 92). The Attorney who made the decision regarding coverage under the Act further testified that the job evaluation was made prior to the time this petitioner was employed (R. 93). The District Court thereupon found that the petitioner was entitled to wages for 8 hours a day out of the 14 or a total of 56 hours per week with overtime to be paid for all hours worked in excess of the 40 hour week, the 6 hours being deducted as sleeping time and held not compensable. The total amount of the judgment was $1722.00 plus costs and attorney's fees. Petitioner appealed to the Circuit Court of Appeals, sitting en banc, no appeal was taken by this respondent, and said court affirmed all of the findings and conclusions of the District Court. There was no dissent.

ARGUMENT

The judgment of the Circuit Court of Appeals is correct and is not in conflict with any other decision so as to warrant further review of the case by this court.

1. The petitioner contends that the Circuit Court of Appeals for the Fourth Circuit in sustaining the finding of the District Court that the petitioner was not entitled to compensation for the six hours of sleeping time, had decided said case in a manner in conflict with a decision of the Circuit Court of Appeals for the Eighth Circuit and has cited the case of the

Central Missouri Telephone Company v. Conwell, 170 *Fed. 2nd*, 641. The Conwell case is not in conflict with the decision of this court, as the facts and circumstances are different and are not pertinent to the present case decided by the Fourth Circuit.

In the Conwell case decided on November 16, 1948, the employee worked as a telephone switchboard operator in a telephone exchange. The employee worked from 9 o'clock P. M. to 8 o'clock A. M. and was paid for eight hours of the eleven hours. The balance of three hours was designated as sleeping time. Later this sleeping time was reduced to two hours. However, here the telephone exchange was located in a town with a population of 1800 people and with between 600 and 700 telephone patrons. Long distance calls also came through this switchboard during the night. The number of phone calls coming through the switchboard varied from time to time, and on many occasions the operators were interrupted frequently to handle these calls. The *District Court here had found that the sleeping time was compensable and the Circuit Court of Appeals did not overrule the question of fact found by the District Court.* The facts in said case regarding interruptions during the period allotted as sleeping time cannot be compared with the lack of interruptions in the present case which the record shows as 18 times in a period of almost two years. This same court was the court which decided the case of *Rokey & Day vs. Zimmerman*, 157 *Fed. 2nd*, 734, wherein the court held that sleeping time was not compensable because ample consecutive hours of sleep were permitted, and interruptions were infrequent. *The question of whether the interruptions are sufficient to prevent the getting of a night's sleep is a question of fact to be decided by the trial court, and that finding should be sustained.* The courts have held that it is impossible to lay down any arbitrary rule regarding sleeping time which may be compensable, and the determination of whether time so spent is or is not working time depends upon the facts of the particular case. *Armour and Company v. Wantock*, 323 *U. S.* 126, 65 *S. C.* 165, *rehearing denied*, 65 *S. C.* 427. *Skidmore v. Swift and Company* 323 *U. S.* 134, 65 *S. C.* 161. In the *Armour* case the District Court held that the usual hours for sleeping and eating would not be counted but that the remaining hours would be

counted. *The employees took no appeal from the judgment insofar as it was adverse to them.* The case thereupon rested in the Circuit Court of Appeals on the question of whether the time spent on the employer's premises *other than sleeping and eating time* would be compensable, *it being conceded that sleeping time was not compensable.* In the *Skidmore* case, cited above, again the question was presented as to how much of the time on the employer's premises was compensable. The Supreme Court in said case said that the *employees were very rarely interrupted in their normal sleeping and eating time and these were pursuits of a purely private nature which would presumably occupy the employees time whether they were on duty or not and thus this Court has held in said case that sleeping time when rarely interrupted is not compensable.* The remainder of the time on the premises the court held was compensable. Solicitor General Fahey who filed a brief as ameci curiae for the Government agreed that sleeping and eating time should be excluded, but that the remaining time on the premises should be held compensable.

The case of *Bell v. Porter*, 159 *Fed. 2nd* 117, *certiorari granted* 330 *U. S.* 817, *vacated* 330 *U. S.* 813, *rehearing denied* 331, *U. S.* 864, likewise held that sleeping time was not compensable, although the petitioner attempts to distinguish these cases because these men were firemen. *Bowers v. Remington Rand, D. C. Ill. F. Supp.* 620, *affd. C. A.* 159 *F. 2nd* 114, *Cert. Denied*, 330 *U. S.* 843, 67 *S. Ct.* 1083, *Rehearing Denied* 331 *U. S.* 854, 67 *S. Ct.* 1198, also held that sleeping time was not compensable. The petitioner has attempted to distinguish all of these cases from the present case on the ground that they all involve firemen on 24 hour duty jobs. However, the question decided is the same as in the present case, because sleeping time if uninterrupted is not compensable as heretofore held by this court. Whether a man is a fireman, a night watchman or a telephone operator would not differentiate or distinguish the case. The question decided was that if the hours of sleep were uninterrupted or rarely interrupted then the time was not compensable.

The petitioner likewise inferred that he was in sole charge of and responsible for the respondent's utility system during the time he was at work. This is not correct and is not shown

either by the evidence nor can it be implied. (R. 71). The man was not an engineer, was not trained in any way to operate any of the facilities of the company and all of the equipment was automatic, not requiring personal attention. No responsibility was placed on this petitioner to perform any job except to relay emergency trouble calls to the service man. (R. 71). In the case of *Bridgeman v. Ford, Bacon and Davis*, 161, *Fed. 2nd*, 962, the demand was made for payment for 8 hours sleeping time on the grounds that during this 8 hour period the employee was compelled to perform some tasks, such as checking the fire engines, sweeping out their dormitory and making up their beds. The time it took to perform these services ranged from an hour down to ten or twenty minutes. The court refused to allow compensation for any part of the 8 hour period and the Circuit Court held that the amount of work done by the employees was so small as to have made it possible for the District Court to have considered it as falling within the *de minimus* rule. The case of *Howard v. Southern Continental Telephone Company*, 72 *Fed. Supp.* 276, is further authority for the position taken by the respondent that sleeping time is not compensable even in the case of a night shift switchboard operator, where the operator was permitted to sleep in suitable sleeping facilities *and had consecutive hours of uninterrupted sleep each night*. The general rule, therefore, as laid down by this court is that sleeping time when uninterrupted or rarely interrupted is *not* compensable.

The petitioner by letter has cited an additional case, *General Electric Company v. Porter*, 208 *Fed. 2nd*, 805 (*C. A.* 9), *Certiorari denied, April* 26, 1954, in support of his claim that the decision of the Fourth Circuit in the present case is in conflict with said *General Electric v. Porter* case (this case was not originally cited in petitioner's brief). However, the *General Electric v. Porter* case is differentiated in the opinion, from the group of cases heretofore cited which hold that sleeping time is not compensable, because in the General Electric Company case the fireman were employed not only to protect the General Electric Company plant but *were also employed to protect two populous communities of some thirty thousand persons covering a wide area*. The court further stated, "*that the sleep allowed was a fitful one at best*, which might be said to have been with one eye open in anticipation of the moment

that they would be called upon to jump to the response of an alarm." The court further stated that the probability of an alarm at night where the firemen were protecting two communities was far greater than would have been involved in the protection of only the industrial plant. Therefore, this case is clearly distinguishable from the present case. The court in the *Ninth Circuit* did not contend that the law as set forth in the previous cases cited was wrong in denying compensation for sleeping time, but found that the facts in the General Electric Company case were clearly distinguishable.

2. The petitioner has contended in his brief that the Circuit Court of Appeals' decision in this case conceded that the facilities were inadequate as to comfort, safety, and other facilities. *This is an inaccurate statement of the Circuit Court of Appeals position on this point.* The Court of Appeals stated that "*the Record shows that appellant was furnished a room with a bed, heater and telephone; that he had the added facilities of a wash basin and toilet near by, and that he agreed without apparent protest to furnish his own bed clothes. We cannot say that such facts fall short of substantiating the District Court's finding of adequate facilities despite appellant's stress upon the lack of a bath tub, upon the dangerous type of heater furnished, and upon the general dirtiness of quarters. It is quite significant that, during the entire time of his employment, appellant never made any complaint to his employer about the facilities given to him.*" It is clear from a reading of this entire statement that the Circuit Court of Appeals *affirmed* the District Court in the position taken by said District Court that the facilities were adequate, *even though* the petitioner stressed the point that said facilities were inadequate. The District Court was the tryer of the facts in this case and the findings of said court that said facilities were adequate should not be disturbed. The Circuit Court of Appeals has refused to disturb this finding of fact and has agreed that said facilities as furnished were adequate.

The Circuit Court of Appeals does state in the opinion that it is significant that this petitioner made no complaints about the conditions and facilities given him, but said court has in no way held that this petitioner by inaction or failure to complain, has waived or released his right to, or was estopped from

claiming compensation for said sleeping time. The petitioner has attempted to disturb the decision of the Circuit Court of Appeals by contending that the Circuit Court of Appeals held that this petitioner had waived his rights to claim said compensation by his inaction and failure to complain. *The finding of fact by the District Court and sustained by the Circuit Court of Appeals was that the facilities furnished were adequate*, and *not* that the petitioner had waived his rights by virtue of his failure to complain of the facilities. The cases cited in the petitioner's brief, *Tennessee Coal and Iron Company v. Muscoda Local*, 321 *U. S.* 590, *and the case of Brooklyn Savings Bank v. O'Neil*, 324 *U. S.* 697 do not pertain to the matters involved in this case. Nor does the citation of the petitioner of the case of *Handler v. Thrasher* 191 *Fed. 2nd*, 120, apply in this case,*as a finding of fact that facilities were adequate was found by the District Court and sustained by the Circuit Court of Appeals.*

3. The petitioner likewise contends that the District Court's finding that the petitioner was not entitled to liquidated damages was improper. *Section* 11 *of the Portal to Portal Act*, 29 *U. S. C. A.* 260, provides, "If the employer shows to the satisfaction of the court that the act or omission giving rise to such action was in *good faith* and that he had *reasonable grounds* for believing that his act or omission was not a violation of the *Fair Labor Standards Act of* 1938 *as amended*, the Court may in its sound discretion, award no liquidated damages or award any amout thereof not to exceed the amount specified in Section 216 (b) of this title." The *Trial Court* found that the respondent had acted in *good faith and on reasonable grounds* for believing that the petitioner was not under the Act. In fact, the trial court after deciding the other questions involved in this case withheld decision for a time on the question of whether the petitioner was an employee covered by the Act. (R. 7).

The witness for the respondent, as heretofore stated, was an *attorney* and also consulted with a labor relations expert in the Bluefield area, said labor relations adviser having formerly been with the Wage and Hour Division of the Labor Department, and said attorney and officer studied the duties of this particular job before reaching the conclusion that said employee

was not a covered employee. (R. 92). The petitioner places great stress on the question presented to this witness as to whether or not said witness had read the cases of *Kirschbaum v. Walling*, 316 *U. S.* 517, and *Walton v. Southern Package Company*, 320 *U. S.* 540. The witness stated that he could not remember whether he had read these cases or not since his appraisal of this job had been made a year and a half or two years previous to the date of the suit. (R. 60).

It is interesting to note that in the *Kirschbaum* case Justice Frankfurter has stated that "to search for a dependable touchstone by which to determine whether employees are engaged in commerce or production of goods for commerce, is as rewarding as an attempt to square the circle", and Justice Roberts wrote the dissenting opinion in this case. *The Walton* case certainly does not fall within the facts of the present case as a determination of whether petitioner was a covered employee, as that case involved a night watchman who had to make regular rounds, punch a night watchman's clock, and the court through Justice Black laid great stress on the fact that reduced fire insurance premiums were conditioned upon the presence of a night watchman on the premises. None of these facts existed in the present case. *Landaas v. Canister*, 188 *Fed. 2nd*, 768, in upholding the refusal to grant liquidated damages says that it is not necessary to rely upon an administrative ruling in order to relieve an employer from liability for liquidated damages. The provisions of the Act, 29 *U. S. C. A.* 259, provides in effect that if an employer relies upon an administrative ruling the said reliance is a *complete defense. Section* 260, however, gives the court discretion as to liquidated damages and something less is sufficient for this purpose. *The court, as stated in this case, will not disturb the Trial Court's decision in refusing to allow liquidated damages unless same was clearly erroneous. Fed. Rules of Civil Procedure, Rule* 52, 28 *U. S. C. A.* The court further held that refusal to grant liquidated damages was within the trial court's discretion. *Brown v. Dunbar*, 189 *Fed. 2nd*, 871. In the case of *Clougherty v. James Venor Company*, 187 *Fed. 2nd*, 288, *certiorari denied*, 342 *U. S.* 814, the court held that the refusal of the District Court to grant liquidated damages did not constitute an abuse of discretion and the court said that "no circumstances of bad faith, malice, or oppression existed . . . . . we cannot say that this finding was manifestly erroneous."

Section 11 *of the Portal to Portal Act* 29 *U. S. C. A.* 260 leaves the question of liquidated damages to the discretion of the trial court and this discretion, although not absolute, cannot be disturbed unless said finding is manifestly erroneous. The District Court as the tryer of the facts is in a position to determine the good faith of the respondent employer and whether he acted upon reasonable grounds.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

LeROY KATZ,
Attorney for Respondent.

June 1, 1954.

APPENDIX

Section 16(b), *Fair Labor Standards Act* of 1938, as amended (29 U. S. C. A. 216):

> "(b). Any employer who violates the provisions of Section 6 or Section 7 of this Act (Sections 206 or 207 of this title) shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and an additional amount as liquidated damages.—".

Section 11, *Portal to Portal Act* (29 U. S. C. A. 260):

> "260. Liquidated Damages.—In any action commenced —to recover unpaid minimum wages, unpaid overtime compensation, or liquidated damages, under the Fair Labor Standards Act of 1938—, if the employer shows to the satisfaction of the court that the — omission giving rise to such action was in good faith and that he had reasonable grounds for believing that his — omission was not a violation of (the Act), the court may, in its sound discretion, award no liquidated damages or award (any amount less than) specified in Section 16 (b) of such Act."

Rule 52, *Federal Rules of Civil Procedure as Amended.*

> "(a) Effect. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. *Findings of fact shall not be set aside unless clearly erroneous,* and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses.

Portal to Portal Act, 29 *U. S. C. A.* 259 (*a*)

"(a) In any action or proceeding based on any act or omission on or after May 14, 1947, no employer shall be subject to any liability or punishment for or on account of the failure of the employer to pay minimum wages or overtime compensation under the Fair Labor Standards Act of 1938 as amended, the Walsh-Healey Act, or the Bacon-Davis Act, if he pleads and proves that the act or omission complained of was in good faith in conformity with and in reliance on any written administrative regulation, order, ruling, approval, or interpretation, of the agency of the United States specified in subsection (b) of this section, or any administrative practice or enforcement policy of such agency with respect to the class of employers to which he belonged. Such a defense, if established, shall be a bar to the action or proceeding, notwithstanding that after such act or omission, such administrative regulation, order, ruling, approval, interpretation, practice, or enforcement policy is modified or rescinded or is determined by judicial authority to be invalid or of no legal effect."